85-1219

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRANSWESTERN PIPELINE COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 21, 1986

QUESTIONS PRESENTED

1. Did the Federal Energy Regulatory Commission ("Commission") exceed its authority in Order No. 380 when, in order to increase competition among pipelines, it abrogated, on a generic basis pursuant to informal rulemaking proceedings, long standing purchase provisions in contracts between interstate pipelines and their customers which it had previously reviewed and approved under Section 7 of the Natural Gas Act ("Act")?

2. Do the informal comment procedures under Section 4 of the Administrative Procedure Act satisfy the hearing and substantial evidence requirements of the Act and meet the due process requirements of the Fifth Amendment under circumstances in which the Commission is considering the abrogation of contracts and the alteration of certificated service?

3. Did the Commission exceed its authority in Order No. 380 in invalidating and proscribing all contract and tariff provisions which caused or required the pipelines' distributor customers to purchase specified volumes of gas on the ground that such provisions prevented such customers from "shopping around" and were therefore *per se* "anti-competitive" and "unjust and unreasonable"?

4. Did the Commission act arbitrarily in failing to address purchase obligations in the pipelines' contracts with their producer/suppliers after having invalidated purchase obligations in their contracts with their distributor customers?

5. Does the Commission have authority under Section 5 of the Act, whether through informal rulemaking proceedings or otherwise, to revoke or substantially modify certificates of public convenience and necessity issued under Section 7 of the Act?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
PARTIES TO THE PROCEEDING BELOW	vii
LIST OF SUBSIDIARIES AND AFFILIATES PURSUANT TO RULE 28.1	ix
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
1. The Decision of the Court of Appeals Is in Conflict with Principles Enunciated in the Decision of This Court Concerning the Role of Contracts under the Natural Gas Act and the Proof Required for Their Abrogation	8
2. This Court Should Review To Determine Whether the Procedures Followed by the Commission Were Sufficient To Satisfy the Hearing Requirements of Section 5 of the Act, the Substantial Evidence Requirements of Section 19 of the Act, and Otherwise To Satisfy the Requirements of Due Process	12
3. This Court Should Address the Conflict Between Contract Integrity and What Order No. 380 Determines to Be the "Anti-Competitive" Effect of Contracts Requiring the Purchase of Specified Volumes of Gas	18

PAGE

4. This Court Should Review To Determine Whether the Commission Can Lawfully Abrogate Only that Part of Transwestern's Contracts Which Required Its Customers To Purchase Gas and Purportedly Leave in Effect the Remainder of the Contract Requiring Transwestern To Provide Firm Service at Contracted Levels 20

5. This Court Should Review To Correct the Commission's Failure To Address Purchase Obligations in Pipeline Contracts with Producers 21

6. This Case Presents the Issue of the Commission's Authority, Through Informal Rulemaking Procedures, To Revoke or Substantially Modify Certificates of Public Convenience and Necessity To Serve Particular Needs 22

CONCLUSION 25

APPENDIX ..... A-1 *et seq*

TABLE OF AUTHORITIES

Court Cases	PAGE
American Public Gas Association v. *FPC*, 567 F.2d 1016 (D.C. Cir. 1977), *cert denied*, 435 U.S. 907 (1978)	14
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	2, 9
Atlantic Refining Co. v. *Public Service Commission*, 360 U.S. 378 (1959)	10, 22
Bi-Metallic Investment Co. v. *State Board of Equalization*, 239 U.S. 441 (1915)	13
CAB v. *Delta Air Lines*, 367 U.S. 316 (1961)	22
Chicago Board of Trade v. *United States*, 246 U.S. 231 (1918)	19
City of Oglesby v. *FERC*, 610 F.2d 897 (D.C. Cir. 1980)	10
Farmers & Merchants Bank v. *Board of Governors*, 567 F.2d 1082 (D.C. Cir. 1977)	16
Florida Power & Light Co. v. *FERC*, 598 F.2d 370 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980)	22
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)	2, 8
Gulf Oil Corp. v. *FPC*, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978)	20
Iowa State Commerce Commission v. *Office of Federal Inspector*, 730 F.2d 1566 (D.C. Cir. 1984)	16
Metropolitan Edison Co. v. *FERC*, 595 F.2d 851 (D.C. Cir. 1979)	10
Mobil Oil Corp. v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973)	16
National Association of Broadcasters v. *Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982)	16
Ohio Bell Telephone Co. v. *Public Utilities Commission*, *301 U.S. 292 (1937)*	13

	Page
The Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	7, 9
Richmond Power & Light v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973)	10
Sam Rayburn Dam Electric Cooperative v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976)	10
Sunray Mid-Continent Oil Co. v. *FPC*, 364 U.S. 137 (1960)	9
Town of Alexandria v. *FPC*, 555 F.2d 1020 (D.C. Cir. 1977)	10
Union Oil Co. of California v. *FPC*, 542 F.2d 1036 (9th Cir. 1976)	16
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)	8
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964)	19, 20
United States v. *Florida East Coast Railway*, 410 U.S. 224 (1973)	13
United States v. *Seatrain Lines*, 329 U.S. 424 (1947)	22
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978)	13, 16, 17
Commission Cases	
Columbia Gas Transmission Corp. v. *Tennessee Gas Pipeline Co.*, 24 FERC ¶ 61,050 (1983)	13
Northwest Central Pipeline Corp. v. *Arkansas Louisiana Gas Co.*, 24 FERC ¶ 61,092 (1983)	14
Pacific Gas Transmission Co., 40 FPC 1147 (1968), *modified*, 41 FPC 251 (1969)	4
Transwestern Pipeline Co., 22 FPC 391, *modified*, 22 FPC 542 (1959)	3, 4, 14, 21
Transwestern Pipeline Co., 34 FPC 659 (1965)	4
Transwestern Pipeline Co., 41 FPC 134 (1969)	4

	PAGE
Transwestern Pipeline Co., 36 FPC 176 (1966), aff'd. *sub nom. Southern California Edison Co.* v. *FPC*, 387 F2 619 (3rd Cir. 1967) cert. denied, 392 US 909 (1968)	4
Transwestern Pipeline Co., 43 FPC 322 (1970)	4
Transwestern Pipeline Co., 23 FERC ¶ 63,114 (1983)	14
Trunkline LNG Co., 22 FERC ¶ 61,245 (1983)	23
Trunkline LNG Co., 22 FERC ¶ 63,028 (1983)	23
Statutes	
Section 4, Administrative Procedure Act, 5 U.S.C. § 553, (1982)	2, 6, 14
Section 5, Administrative Procedure Act, 5 U.S.C. § 554 (1982)	2
Section 7, Administrative Procedure Act, 5 U.S.C. § 556, (1982)	2
Section 8, Administrative Procedure Act, 5 U.S.C. § 557, (1982)	2
Section 5, Natural Gas Act, 15 U.S.C. § 717d, (1982)	2, 7, 12, 24
Section 7, Natural Gas Act, 15 U.S.C. § 717f, (1982)	2, 5, 12, 22, 24
Section 19, Natural Gas Act, 15 U.S.C. § 717r, (1982)	2, 16
Section 206, Federal Power Act, 16 U.S.C. § 824e, (1982)	2, 17
Section 313, Federal Power Act, 16 U.S.C. § 825*l*, (1982)	2, 17
28 U.S.C. §§ 1254(1), 2350, (1982)	2
Section 403(c), Department of Energy Organization Act, 42 U.S.C. § 7173(c), (1982)	2, 14, 15
Commission Regulations	
III Fed. Energy Guidelines (CCH) ¶¶ 30,571, 30,584, 30,607 (1984)	1
18 C.F.R. § 154.1 *et seq* (1985)	5

PARTIES TO THE PROCEEDING BELOW

Algonquin Gas Transmission Company
Aluminum Association, The
ANR Pipeline Company
Arkansas Louisiana Gas Company
Brooklyn Union Gas Company, The
Cascade Natural Gas Corporation
Chattanooga Gas Company
City Gas Company
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
Consolidated Gas Supply Corporation
Consolidated Gas Transmission Corporation
Consumers Power Company
El Paso Natural Gas Company
Equitable Gas Company
Foothills Pipe Lines (Yukon), Ltd.
Georgia Industrial Gas Group, The
Great Lakes Gas Transmission Company
Illinois Gas Company
Inter-City Gas Corporation
Kansas State Corporation
Madison Gas and Electric Company
Michigan Consolidated Gas Company
Michigan Gas Utilities Company
Michigan Public Service Commission, The
Midwestern Gas Transmission Company
MIGC, Inc.
Natural Gas Pipeline Company of America
Northern Illinois Gas Company
Northwest Energy Company on behalf of Northwest Pipeline Corporation and Northwest Central Pipeline Corporation
Northwest Natural Gas Company
Pacific Gas and Electric Company
Pacific Interstate Companies
Pacific Interstate Offshore Company
Pacific Lighting Gas Supply Company
Pacific Offshore Pipeline Company
Pan-Alberta Gas Ltd.
Panhandle Eastern Pipe Line Company

People of the State of California, The
Peoples Gas Light and Coke Company, The
Process Gas Consumers Group, The
Public Service Commission of the State of New York .
Public Service Commission of Wisconsin, The
Public Service Electric and Gas Company
Public Utilities Commission of the State of California
Southern California Gas Company
State of Michigan, The
Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.
Texas Eastern Transmission Corporation
Texas Gas Transmission Corporation
TransCanada Pipelines Ltd.
Transcontinental Gas Pipe Line Corporation
Transwestern Pipeline Company
Trunkline Gas Company
Washington Gas Light Company
Washington Natural Gas Company
Wisconsin Fuel and Light Company
Wisconsin Gas Company
Wisconsin Gas and Electric Company
Wisconsin Natural Gas Company
Wisconsin Power and Light Company
Wisconsin Public Service Corporation

LIST OF SUBSIDIARIES AND AFFILIATES PURSUANT TO RULE 28.1

Belco Petroleum Corporation
- Belco Development Corporation
- Belco Petroleum Australia, Inc.
- Belco Petroleum Corporation of Peru
- Belco Petroleum Ecuador, Inc.
- Belco Petroleum International, Ltd.
- Belco Petroleum Latin America, S.A.
- Belco Petroleum North America, Inc.
- Belco Petroleum of Israel, Ltd.
- Belco Wyoming Corporation
- Belcoal, Inc.
- BelNorth Petroleum Corporation
- BelNorth Energy Corporation
- I N Holdings, Inc.
  - Andex Oil Co. Ltd.
- Pelican Exploration, Ltd.
- Sonneborn Associates Petroleum Corporation

Cogeneration Resources Company

HNG InterNorth Gas Marketing, Inc.

HNG InterNorth, Inc.

Houston Natural Gas Corporation
- The Bermuda Company
- Black Marlin Pipeline Company
- Coal Properties Corporation
- Co-Gen Fuels Company
  - HNG Bayou Co-Gen, Inc.
  - HNG Mojave, Inc.
- Comanche Marketing, Inc.
- Continental Group Resources Company
- Cora Dock Corporation
- Florida Gas Transmission Company
- Florida Hydrocarbons Company
- Florida Intrastate Pipeline Company
- Gulf Company Ltd.
- HNG Capital Corp.
- HNG Clearing House Company
- HNG Cortez Pipeline Company
- HNG Gas Liquids, Inc.

HNG Industrial Natural Gas Company
HNG InterNorth Operating Company
HNG Interstate Pipeline Company
HNG Offshore Company
HNG Oil Company
- FEC Offshore Inventory Co.
- Florida Exploration Company
- HNG Exploration Company
- HNG Fossil Fuels Company
- HNG Oil (Sumatra) Inc.
- Ocelot Oil Company
- Southeastern Exploration Company

HNG Resources, Inc.
HNG Texoma Gas Company
HPI Transmission, Inc.
Houston Pipe Line Company
InterNorth, Inc.
Intratex Gas Company
Llano, Inc.
Llano CO_2, Inc.
Marcoal Inc.
Marine Industries Inc.
Minerals Inc.
Natural Gas Marketing & Storage Company
NMesco Fuels, Inc.
Pacific Atlantic Marketing, Inc.
Panhandle Gas Company
Pott Industries Inc.
- Caruthersville Shipyard Inc.
- The Dixie Dredge Export Corporation
- Paducah Marine Ways Incorporated
- River Equipment Co.

Riverside Farms Company
Sunniland Pipe Line Company, Inc.
Transgulf Pipeline Company
Transgulf Terminal & Storage Company
Transwestern Pipeline Company
Valley Pipe Lines, Inc.

Hydrocarbon Transportation, Inc.
InterNorth International Incorporated
    Consolidated Gathering Systems Limited
        Consolidated Natural Gas Limited
    Consolidated Pipe Lines Company
    Consolidex Gas and Oil Limited
    InterNorth International Oil, Inc.
    Northern Liquid Fuels International Ltd.
        InterNorth Petrochemical Division
        N.L.F.I. International (U.K.) Ltd.
        N.L.F.I. Products and Crude, Inc.
    The Protane Corporation
Norchem, Inc.
    Norval Polymers Company
Northern Arctic Gas Company
Northern Coal Company
Northern Coal Pipeline Company
Northern Cogeneration One Company
Northern Cogeneration Two Company
Northern Cogeneration Three Company
Northern Cogeneration Four Company
Northern Cogeneration Five Company
Northern Engineering International Co.
Northern Gas Gathering, Inc.
Northern Gas Products Company
    Florida Hydrocarbons Company
    HNG Gas Liquids, Inc.
    HPI Transmission, Inc.
    NGP Pipeline Company
Northern Helex Company
Northern Intrastate Pipeline Company
Northern Minerals Company
Northern Natural Resources, Inc.
Northern Oil Interstate Pipeline Company
Northern Overthrust Pipeline Company
Northern Plains Natural Gas Company
AmNorth, Inc.
    Northern Border Pipeline Company
Northern Texas Intrastate Pipeline Company
Northern Trailblazer Pipeline Company
    Pathfinder Assurance Limited

UPG, Inc.
- Falcoal, Inc.
- J.E. Fowler Petroleum Products, Inc.
- J.T. Richardson Rig & Construction, Inc.
- Port Cordova, Inc.
- UPG Falco Division of UPG, Inc.
- Webster Transportation Company, Inc.

West Texas Carrier Corporation

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v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Transwestern Pipeline Company ("Transwestern") seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit upholding a series of orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") that declared unlawful "minimum bill" and "minimum take" provisions in Transwestern's contracts and tariffs and those of other interstate natural gas pipeline companies subject to the jurisdiction of the Commission under the Natural Gas Act (the "Act").[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 770 F.2d 1144 and is reproduced in the Appendix to this Petition. The orders of the FERC are reported at III Fed. Energy Guidelines

[1] Such orders, which were issued in FERC Docket No. RM83-71, are identified as Order Nos. 380, 380-A, 380-B, 380-C and 380-D. These orders are referred to in this petition as "Order No. 380."

(CCH) ¶¶ 30,571, 30,584, 30,607 (1984), and are likewise reproduced in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1985. App at 57. Rehearing was denied on October 25, 1985. App at 69. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2350 (1982).

STATUTES INVOLVED

The principal statutory provisions involved are Sections 5(a), 7(b), (c), (e), and 19(b) of the Natural Gas Act of 1938, 15 U.S.C. §§ 717d(a), 717f(b), (c), (e), 717r(b) (1982), Sections 4, 5, 7 and 8 of the Administrative Procedure Act, 5 U.S.C. §§ 553-554, 556-557 (1982), and Section 403 of the Department of Energy Organization Act, 42 U.S.C. 7173(c) (1982), all of which are printed in the Appendix.[2]

STATEMENT OF THE CASE

This case involves the validity of Order No. 380. There, in order "to promote price competition among pipelines" (see App 34.), the Commission abrogated provisions in contracts and tariffs which required or otherwise caused the customers of interstate pipelines to purchase agreed minimum volumes of gas. It did so on a generic basis pursuant to informal rulemaking proceedings.

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[2] Parallel construction is given comparable sections of the Natural Gas Act and the Federal Power Act. *See FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 350-51 (1956); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). Sections 206 and 313 of the Federal Power Act, 16 U.S.C. §§824e, 8251 (1982), are comparable to Sections 5 and 19 of the Natural Gas Act and thus are also implicated. See App. at 293.

Transwestern is a natural gas company regulated by the Commission under the Natural Gas Act. It purchases natural gas produced in Texas, Oklahoma and New Mexico for resale and delivery to its two principal customers, Pacific Lighting Gas Supply Company ("PLGS") and Northwest Central Pipeline Corporation ("NWC"). These customers account for more than 99 percent of Transwestern's total system-wide sales. PLGS redelivers gas purchased from Transwestern to its affiliate, Southern California Gas Company ("SoCal"), for resale and distribution in the Southern California area. NWC supplies markets in the mid-west.

Both SoCal and NWC have suppliers in addition to Transwestern. SoCal receives gas from three affiliated interstate pipelines, two of which deliver gas from the offshore federal domain, while the third delivers gas produced in Canada. SoCal also purchases from another interstate pipeline, El Paso Natural Gas Company, as well as from producers in California. NWC also receives supplies from other interstate pipelines but purchases the majority of its gas supplies directly from producers in Kansas, Oklahoma, Colorado and Wyoming.

Since 1959, when Transwestern was originally certificated to begin service, it has sold gas to PLGS pursuant to privately negotiated contracts which contained minimum bill provisions requiring PLGS to take or pay for certain minimum volumes of gas on a yearly basis and minimum take provisions requiring PLGS to purchase a certain minimum quantity of gas on a daily basis. *See Transwestern Pipeline Co.*, 22 FPC 391, *modified*, 22 FPC 542 (1959).

The contract currently in effect with PLGS was entered into in 1967. It is scheduled to expire in 1991. Under such contract, Transwestern agreed to sell and PLGS agreed to purchase a contract demand or CDQ volume of 750,000 Mcf of gas per day at rates to be approved or determined by the Commission. PLGS agreed to take or pay for 91 percent of the 750,000 Mcf per day

CDQ volume on an annual basis. A five-year "make-up" was provided for gas paid for but not taken. The contract also provided that PLGS would purchase from Transwestern at least 600,000 Mcf of gas per day. This is known as the minimum daily take or MDTQ volume.

The contract and all of its terms were reviewed under Section 7 of the Natural Gas Act, and a certificate of public convenience and necessity was issued by the Commission authorizing Transwestern to make the sales and render the service provided for therein. *Transwestern Pipeline Co.*, 41 FPC 134 (1969).

Transwestern is also authorized to sell a total of 250,000 Mcf of gas per day to NWC. These authorizations, like the authorization to sell to PLGS, were predicated on privately negotiated contracts with NWC, then Cities Service Gas Company, in 1963 and 1967, respectively. Each of such contracts were reviewed and approved by the Commission in contested proceedings under Section 7 of the Act. *Transwestern Pipeline Co.*, 34 FPC 659 (1965); *Transwestern Pipeline Co.*, 43 FPC 322 (1970).[3] Like the PLGS contracts, the contracts with NWC contain a provision called the "minimum purchase obligation", requiring NWC to take or pay for 90 percent of the CDQ on an annual basis with a similar provision for make-up of gas paid for but not taken.[4] Unlike the PLGS arrangement, however, NWC did not commit to take any minimum daily volume.

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[3] As Transwestern was certificated for service to highly competitive markets, virtually all of its contracts, including those abrogated by Order No. 380, were the subject of extensive, contested certificate proceedings. *See e.g. Pacific Gas Transmission Co.*, 40 FPC 1147 (1968), *modified*, 41 FPC 251 (1969); *Transwestern Pipeline Co.*, 36 FPC 176 (1966), affd. *sub nom. Southern California Edison Co.* v. *FPC*, 387 F2 619 (3rd Cir. 1967) cert. denied, 392 US 909 (1968).

[4] Transwestern's base contracts with NWC and its 1967 contract with PLGS are set forth in a separate appendix to this petition.

As required by the Commission's regulations, Transwestern's contracts were restated in tariff and service agreement form. 18 C.F.R. § 154.1, *et seq.* (1985).

To render service to PLGS and NWC, Transwestern purchases gas under more than 1200 contracts with producers. Virtually all of these contracts require Transwestern to "take or pay for" specified quantities of gas on an annual basis, as well as to take minimum volumes of gas on a monthly basis.

Under the Natural Gas Act, Transwestern and other natural gas companies are required to apply for and receive certificates of public convenience and necessity under Section 7 of the Act before they can make the sales or commence the service agreed to in the contracts with their customers. 15 U.S.C. § 717f (1982). The contractual arrangements underlying these certificates establish the type of service which the pipeline proposes and is authorized to perform. In the case of PLGS, Transwestern had an assured market for 600,000 Mcf of gas per day. It was also assured that PLGS would pay for 91 percent of 750,000 Mcf per day. It thus sought and received authorization to provide a high loadfactor, baseload service to PLGS. Similarly, but not with the same level of market assurance, the sales and service which Transwestern proposed for NWC involved assurance that NWC would take or pay for 90 percent of the volume of gas Transwestern was committed to sell and deliver.

In accordance with Commission practice, Transwestern's charges to PLGS and NWC are in the form of a two-part rate consisting of a demand charge based on the maximum contract and certificated levels for each customer and commodity charges which include the cost of gas purchased by Transwestern for resale.

Orders No. 380 and 380-A eliminated gas costs from the commodity rates. App. at 123-24. The Commission concluded that the presence of such costs would have the effect of restraining a customer from purchasing cheaper gas than that available from

a pipeline with whom it had a contract containing a minimum bill provision. Because of this possibility, the Commission concluded that minimum bills were anti-competitive. App. at 85-88. The Commission also reasoned that the take-or-pay aspects of the commodity bill had the potential for permitting the recovery of costs which the pipeline might not have incurred and that such provisions were therefore unjust and unreasonable. App. at 82-85.

After further comments, the Commission in Order No. 380-C found that minimum take provisions in contracts, while not involving the potential for the recovery of costs not actually incurred, were likewise anti-competitive and unlawful. App. at 234. The Commission reasoned that such provisions *"cause customers to take gas they would not otherwise take,* thus resulting in charges to customers in excess of the lowest reasonable cost" and that "like minimum commodity bills, [minimum take provisions] *act as a restraint on competition* because the pipelines and the producers remain artificially insulated from market risk." App. at 234, emphasis added.

The proceedings which led to Order No. 380 were informal rulemaking proceedings under Section 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553 (1982). No evidentiary hearings were held. No formal testimony was received. No cross-examination was permitted. Requests for oral argument were denied. The findings which led to the order were based on unsworn comments and claims made by interested parties. The Commission did not in Order No. 380 make any specific findings with respect to the facts regarding any particular pipeline contract or tariff. Gas costs were excluded from commodity rates, and minimum take provisions were generically invalidated simply on the ground that they were anti-competitive. App. at 85-88.

Transwestern appealed the Commission's orders to the Court of Appeals for the District of Columbia Circuit. *Wisconsin Gas*

Co., et al. v. *FERC*, Nos. 84-1358 *et al.* (appeal filed July 30, 1984). Transwestern's principal contentions were those raised here. With the exception of one matter not urged by Transwestern, the court below affirmed the Commission. It agreed with the Commission's rationale that contractual provisions which prevent customers "from shopping for low-cost gas" were anti-competitive and thus unlawful. App. at 36. Its treatment of the matter of contract abrogation was relegated to a brief statement in a footnote:

> Petitioners also contend that the Order unlawfully alters the terms of existing contracts by destroying the mutuality of obligations between the pipeline and the partial requirements customer. This claim is frivolous. Fixed costs are still recoverable from partial requirements customers through the demand charges and through the fixed cost portions of the minimum bill. At any rate, section 5 gives the Commission authority to alter terms of any existing contract found to be "unjust" or "unreasonable." 15 U.S.C. § 717d(a). *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 783-84 (1968) (rejecting gas producers' argument that Commission action might destroy the contracts in which unjust price escalator clauses were found, holding that "the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests").[5]

App. at 25-26, n.9.

The court of appeals also upheld the adequacy of the Commission's procedures, stating that nothing more was required of the Commission than the minimum procedures specified for informal rulemakings in the Administrative Procedure Act. App. at 55.

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[5] The court's statement with respect to fixed-cost recovery is correct in theory only. As the court noted, substantial fixed costs are included in the commodity portion of a pipeline's rate. App. at 18. Consequently, unless the pipeline sells at or above volume levels utilized in determining rates, it will not recover all of its fixed costs, including its allowed return on equity. *See* App. at 173-74.

As the result of Order No. 380, Transwestern has no assurance, despite its contracts, that any of the gas for which it has contracted with producers and for which it has constructed a pipeline to deliver will be purchased. It nonetheless remains obligated to deliver full contract volumes to PLGS and NWC whenever called upon to do so.[6]

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is in Conflict with Principles Enunciated in the Decisions of This Court Concerning the Role of Contracts under the Natural Gas Act and the Proof Required for Their Abrogation.

The significant role of contracts under the Natural Gas Act was first before this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).[7] The Court there stated:

> [O]nly a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public

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[6] The impact of Order No. 380 on Transwestern is particularly severe and anomalous. Such order exempts high-cost Canadian supplies purchased by SoCal. App. at 201-03. It also exempts high-cost gas purchased from producers by NWC. App. at 152-54. Thus, with respect to both PLGS and NWC, Transwestern is squeezed between lower-cost gas supplies available to those customers and such customers', or their affiliates', obligations, which are not affected by Order No. 380, to purchase higher-cost gas from other suppliers. The effect of the minimum bill and minimum take provisions in Transwestern's contracts had been to protect it against these contingencies.

[7] *See also FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) (dealing with the role and effect of contracts under the Federal Power Act).

> interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

Id. at 339. The Court also stated:

> By preserving the integrity of contracts, [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry.

Id. at 344. The Court made clear, however, that such contracts remain "fully subject" to the authority of the Commission to modify them "when necessary in the public interest," concluding that

> [t]he Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

Id. at 344.

In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 154 (1960), this Court, citing *Mobile* stated clearly:

> [T]he scheme of the [Natural Gas] Act was one which built the regulatory system on a foundation of private contracts.

This Court went on to say that *Mobile* "underwrote" the integrity of private contracts under the Natural Gas Act. *Id.* at 154.

In *The Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968), this Court again reiterated the importance of private contracts under the regulatory scheme of the Act and the Commission's limited authority to modify them:

> The regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity. *See United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332.

See also Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571, 582 (1981) (Commission lacks authority, "absent extraordinary circumstances," to abrogate existing contractual arrangements);

City of Oglesby v. *FERC*, 610 F.2d 897, 903 (D.C. Cir. 1980); *Richmond Power & Light Co.* v. *FPC*, 481 F.2d 490, 496-97 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973); *Sam Rayburn Dam Electric Cooperative* v. *FPC*, 515 F.2d 998, 1002 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976); *Town of Alexandria* v. *FPC*, 555 F.2d 1020, 1030 n.55 (D.C. Cir. 1977). As expressed by the court of appeals in the context of parallel provisions of the Federal Power Act,

> [t]he terms of the contract determine the parties' obligations; their agreement should be modified by the Commission . . . *only if imperatively demanded by the public interest.*

Metropolitan Edison Co. v. *FERC*, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979) (emphasis supplied).

The significant role of privately negotiated contracts between pipelines and their distributor customers is thus a firmly entrenched concept in the jurisprudence of the Natural Gas Act.

The court below erred in accepting the Commission's premise that, notwithstanding prior review and approval, any contract provision which inhibits the ability of a pipeline's customer to purchase lower-cost gas is anti-competitive and unlawful *per se*. If enforceable commitments to purchase cannot be enforced, a distributor customer's ability to enter into stable supply arrangements is severely prejudiced. There is, as a practical matter, no reason for a pipeline seller to enter into a firm commitment to sell and to install the facilities necessary for such sale, without a corresponding obligation on the part of its potential customer to purchase sufficient volumes of gas to justify the enterprise.

In *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 388 (1959), this Court observed that it was the intention of Congress that natural gas be sold in interstate commerce at the lowest reasonable rate "consistent with the maintenance of adequate service and the public interest." The Commission in

Order No. 380 focuses solely on current supply and price conditions, disregarding the congressional mandate that the maintenance of adequate service be also considered.

Further, as *Mobile* correctly noted and anticipated, vast amounts have been invested in facilities in reliance on purchase commitments contained in contracts between pipeline suppliers and their distributor customers. Order No. 380 does not address any specific contract in the context of its actual operation. No finding is made that any particular contract in such context is "unjust or unreasonable" or otherwise contrary to the public interest. The Commission's authority to limit the pipeline's ability to enter into enforceable contracts assuring the purchase of specific volumes of gas, as well as its authority to abrogate contracts without specifically addressing such arrangements, are matters which directly and substantially affect both existing and future sales arrangements between pipelines and distributors.

The substantial impact of Order No. 380 on the natural gas industry is acknowledged by the Commission:

> [T]o the extent that the rule may shift certain risks, alter approaches to planning, and allow for more competition in the industry, the *Commission agrees with the commenters who observed that the rule will "restructure" traditional ways of conducting pipeline business.*

App. at 94 (emphasis added).[8]

The importance of these matters in the administration of the Act, together with the total impact of Order No. 380 and the error of the court below in affirming it, warrant review by this Court.

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[8] The Commission justifies its action on the ground that restructuring was the "inevitable outgrowth" of wellhead deregulation under the Natural Gas Policy Act of 1978. 15 U.S.C § 3301 et seq (1985) App. 94. The NGPA did not, however, abrogate the purchase provisions in the pipelines' contracts with their customers.

2. This Court Should Review to Determine Whether the Procedures Followed by the Commission Were Sufficient to Satisfy the Hearing Requirements of Section 5 of the Act, the Substantial Evidence Requirements of Section 19 of the Act, and Otherwise to Satisfy the Requirements of Due Process.

Section 5 of the Act authorizes the Commission, "after a hearing," to determine that a contract is unjust or unreasonable and thus unlawful. *Cf.* 15 U.S.C. § 717d (1982). Whether the hearing requirements of Section 5 are satisfied through informal rulemaking under circumstances in which the Commission is undertaking to abrogate contracts which it has previously reviewed and approved on an individual basis under Section 7 of the Act is an important one which this Court should decide.

The Commission justifies its decision to proceed by informal rulemaking on the ground that "legislative facts" rather than "disputed, adjudicated facts" were involved. App. at 273. The court below agreed. Relying on decisions of this Court with respect to the discretion which administrative agencies have in determining whether to proceed by rulemaking or adjudication, the court of appeals held that the Commission's decision to proceed under the circumstances here by rulemaking "passes muster under our deferential standard of review." App. at 51. Referring to the "industrywide effects" of minimum bill and minimum take provisions, the court below stated:

> The generalized nature of the problems addressed, therefore, did not require trial-type procedures appropriate for retrospective determination of specific facts about individual parties. Rather, notice and comment rulemaking, particularly appropriate for determination of legislative facts and policies of general, prospective applicability, was a manifestly reasonable method of addressing the systemic problems of the natural gas market.

App. at 52.

This Court has made clear, however, that informal procedures will not necessarily suffice under all circumstances. When an

agency is making a quasi-judicial determination by which a relatively small number of persons will be exceptionally affected, in each case, upon individual grounds, additional procedures may be required to afford due process. *See Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978). In *United States* v. *Florida East Coast Railway*, 410 U.S. 224, 242, 245 (1973), the Court noted that its decisions

> represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

Id. at 245. *See, also, Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 446 (1915); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304-05 (1937).

Order No. 380 deals with a limited number of contracts, each of which had been individually reviewed and approved under Section 7 of the Act.[9] Only shortly before Order No. 380 was promulgated, the Commission had concluded that minimum bill provisions involve unique factual questions which were required to be resolved in case-by-case adjudicatory proceedings. In *Columbia Gas Transmission Corp.* v. *Tennessee Gas Pipeline Co.*, 24 FERC ¶ 61,050, at 61,158 (1983), the Commission itself stated:

> [W]e find that the propriety of minimum bill provisions is case-specific and depends on facts and circumstances of the parties; therefore, we believe that the issue must be resolved on a case-by-case basis.

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[9] The Commission in Order No. 380-C noted that only five pipelines had submitted comments opposing elimination of minimum take provisions. App. at 235.

See also Northwest Central Pipeline Corp. v. *Arkansas Louisiana Gas Co.*, 24 FERC ¶ 61,092 at 61,235 (1983); *Transwestern Pipeline Co.*, 23 FERC ¶ 63,114 at 65,290 (1983).

The specific relationship between Transwestern's minimum bill and the take-or-pay provisions in its contracts with producers provide an example. In Order No. 380, the Commission stated that "there is no clear nexus between a pipeline's annual take-or-pay obligations and its minimum bills to its customers." App. at 103. Whatever may be the situation with respect to other pipelines, in Transwestern's case its minimum bill was specifically established at a level which would protect it against take-or-pay liability under its particular circumstances. In the Section 7 proceedings in which Transwestern was originally certificated, the Commission stated:

> The need for a high minimum bill is apparently caused in part at least by the take-or-pay provisions in Transwestern's gas purchase contracts.

Transwestern Pipeline Co., 22 FPC 391, 395 (1959).[10]

Essentially the court below upheld the Commission on the theory that, in rate matters, the hearing requirements of Section 5 could be satisfied through informal rulemaking proceedings under Section 4 of the Administrative Procedure Act. Reasoning that the treatment of minimum take and minimum bill provisions were "ratemaking" matters, Section 403(c) of the Department of Energy Organization Act, 42 U.S.C. § 7173(c) (1982), taken with the lower court's earlier decision in *American Public Gas Association* v. *FPC*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978), were regarded as authoritative. App. at 25.

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[10] As Transwestern has historically been a higher-cost supplier than its principal competitor, El Paso, the minimum bill and minimum take provisions in its contracts were incorporated and approved to assure continued sales. *Cf. Transwestern Pipeline Co.*, 22 FPC 542, 543 (1959).

The court below erred in two significant respects.

First, on its face and as clearly reflected from its legislative history, Section 403 deals narrowly with "the establishment of rates." *See* S. Rep. No. 164, 95th Cong., 1st Sess. 40-41 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News at 894-95. It does not purport even in that respect, however, to authorize the use of *informal* rulemaking proceedings in all cases.

> Any function described in Section 7172 of this title which relates to the establishment of rates and charges under the Federal Power Act [16 U.S.C.A. § 791(a), *et seq.*] or the Natural Gas Act [15 U.S.C. § 717, *et seq.*] may be conducted by rulemaking proceedings. Except as provided in Subsection (d) of this section, the procedures in such a rulemaking proceeding shall assure full consideration of the issues and an opportunity for interested persons to present their views.[11]

App. at 292.

Second, minimum take provisions require the purchase of minimum agreed volumes. They do not even remotely involve "the establishment of rates."

The reach of Section 403 has not previously been before this Court. The court below erroneously expanded the authority of that section well beyond any reasonable construction. This Court should review to correct.

Furthermore, even accepting *arguendo* that the Commission's action with respect to the elimination of variable costs and minimum bills involved rate matters, which can be handled through rulemaking, the question remains whether untested comments submitted in informal rulemaking proceedings by parties seeking relief from their contract obligations constitute

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[11] Section 7172 transfers the functions of the Federal Power Commission to the Federal Energy Regulatory Commission. Subdivision (d) of Section 7173 deals with rates and charges for the first sale of natural gas by a producer.

"substantial evidence" under Section 19 of the Natural Gas Act, 15 U.S.C. § 717r(b) (1982).[12] In its earlier decision in *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1251 (D.C. Cir. 1973), the court below had held that the test of the appropriateness of a particular type of procedure is whether it enabled the Commission to acquire the information needed to discharge its responsibilities under the Natural Gas Act effectively. It stated:

> Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate. A "whole record," as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. Without this critical element, informal comments, even by adverse parties, are two halves that do not make a whole. Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence "substantial" enough to support rates.

Id. at 1260 (emphasis in original).

The court reiterated these standards in subsequent decisions. *Iowa State Commerce Commission* v. *Office of Federal Inspector*, 730 F.2d 1566, 1574 (D.C. Cir. 1984); *National Association of Broadcasters* v. *Copyright Royalty Tribunal*, 675 F.2d 367, 375 (D.C. Cir. 1982); *Farmers & Merchants Bank* v. *Board of Governors*, 567 F.2d 1082 (D.C. Cir. 1977). *See also Union Oil Co.* v. *FPC*, 542 F.2d 1036 (9th Cir. 1976).

In affirming Order No. 380, however, the court reversed itself on the basis of its reading of this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978), and held that *Mobil* was "no longer good law." App. at

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[12] Section 313 of the Federal Power Act contains virtually identical provisions. App. at 293.

54. *Vermont Yankee* was interpreted as prohibiting a reviewing court from determining, in the context of the particular circumstances, the procedural requirements necessary to a "fair hearing." App. at 54.

The court misread *Vermont Yankee*. There this Court explicitly recognized that, under situations involving fact-specific findings affecting a limited number of companies, due process might require more than the procedures outlined in Section 4 of the Administrative Procedure Act. *Id.* at 542 n.17. It is thus important for this Court to review in order to clarify the effect of its decision in *Vermont Yankee* in the context of the facts here and to determine whether the "statutory minima" of informal rulemaking can be employed to abrogate contracts and certificated service arrangements, which the Commission has previously reviewed under Section 7 of the Act and found to be required by the public convenience and necessity.

In sum, whether the informal rulemaking procedures of Section 4 of the Administrative Procedure Act are adequate to satisfy the requirements of due process in the context of the issues here, whether they are adequate to satisfy the hearing and substantial evidence requirements of Sections 5 and 19 of the Act (and by implication Sections 206 and 313 of the Federal Power Act, 16 U.S.C. §§ 824d, 8251 (1982)), whether this Court's decision in *Vermont Yankee* relaxed the standards necessary for the abrogation of contracts, whether Section 403 of the Department of Energy Organization Act authorized contract abrogation through the type of rulemaking procedures provided here are all significant issues having far-reaching effect on the pipeline industry, and clearly merit review by this Court.

3. This Court Should Address the Conflict Between Contract Integrity and What Order No. 380 Determines to Be the "Anti-Competitive" Effect of Contracts Requiring the Purchase of Specified Volumes of Gas.

The question whether a contract provision which requires or induces the purchase of a minimum volume of gas is *per se* anti-competitive and therefore unjust and unreasonable is a significant one which this Court should address. Commitments on the one hand to sell and on the other hand to buy are the essence of any sales transaction. The effect of Order No. 380, in rendering purchase obligations unenforceable, significantly impairs the right, as well as the inclination, of regulated companies to enter into contracts for long-term supply arrangements. If the ability to contract does not include the ability to obtain an enforceable commitment to purchase a particular volume of gas, the right has little meaning.

The Commission, with approval of the court below, has reasoned that pipeline companies cannot by contract require their customers to purchase any particular minimum quantity of gas because to do so necessarily precludes the customer from purchasing equivalent volumes of gas from other sources. This is true. But does it follow, as the Commission further reasons, that such contracts are therefore "anti-competitive" and unlawful? Summarizing and approving the Commission's rationale, the court says:

> As a practical matter, there is no difference between the two [minimum bill and minimum take] contract provisions because, in the case of the minimum bill, customers rarely pay for gas not taken. More importantly, there is no difference between the two types of clauses with respect to the Commission's rationale for the rule; both provisions have the same negative impacts on the natural gas market. Although minimum take provisions do not require customers to pay for gas that they never receive, *the provisions, perhaps more so than minimum bills, impede price*

> *competition among pipelines. A minimum take customer must physically take a minimum quantity of gas, thereby foregoing a cheaper alternative. Thus, the anticompetitive effects of the minimum take provisions are the same as those of minimum bills, and the Commission's rationale properly applies to both.*

App. at 35, n. 18 (emphasis added).

This fallacious reasoning may be contrasted with this Court's observation in *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918):

> [T]he legality of an agreement . . . cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

In *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), this Court recognized that, under the circumstances that prevail in the natural gas industry, long-term contracts involving commitments to purchase gas are not only reasonable, they are indispensable:

> In this regulated industry a natural gas company (unless it has excess capacity) must compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. Those transactions with distributors are few in number. For example, in California there are only two significant wholesale purchasers — Pacific Gas & Electric in the north and the Southern Companies in the south. Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. *The competition then is for the new increments of demand that may emerge with an*

> *expanding population and with an expanding industrial or household use for gas.*

Id. at 659-60 (emphasis in original).

This Court's statement in *El Paso,* which specifically addresses the very issue of the interrelationship of contracts and competition, is in categorical conflict with the rationale underlying Order No. 380. Whether this or any particular Commission has the authority pursuant to "comments" submitted in informal rulemaking proceedings to transform the nature of the natural gas pipeline industry by prohibiting long-term purchase commitments is a matter of substantial importance warranting review by this Court.

4. This Court Should Review to Determine Whether the Commission Can Lawfully Abrogate Only that Part of Transwestern's Contracts which Required Its Customers to Purchase Gas and Purportedly Leave in Effect the Remainder of the Contract Requiring Transwestern to Provide Firm Service at Contracted Levels.

Through Order No. 380, the Commission abrogated that portion of Transwestern's contracts, and those of other pipelines, requiring the purchase of specified minimum volumes of gas but purported to leave in place that portion of its contracts requiring it to sell specified volumes of gas. Whether Section 5 of the Act, under which the Commission has purported to act, authorizes the Commission to abrogate only the purchase commitment under the contract and to leave in place the sale commitment is a significant question, directly implicated by Order No. 380, which the Court should address. While the Commission may have authority to abrogate a contract which it has previously reviewed and approved, that authority does not extend to the abrogation of such an essential element of the contract as a purchase obligation while purportedly leaving in effect the corresponding sales obligation. *Cf.* Aldisert, dissenting, *Gulf Oil*

Corp. v. *FPC*, 563 F.2d 588, 616 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978):

> Simply put, the Commission cannot have it both ways. It cannot approve a contract as the basis of a certificate in the public interest and later, after performance by the parties, abrogate crucial portions of the approved contract ostensibly in the same public interest. Although cloaked with much authority, the Commission has no power to rewrite a contract it has approved.

5. This Court Should Review to Correct the Commission's Failure to Address Purchase Obligations in Pipeline Contracts with Producers.

While eliminating the pipeline customer's obligation to purchase any particular volume of gas, Order No. 380 left intact the pipeline's corresponding contractual commitment with its producer/suppliers, reasoning *inter alia* that there was no "clear nexus" between take-or-pay commitments and minimum bill obligations. See App. 38-39, 182, 211-212. As noted, in Transwestern's case a direct relationship has historically existed. See Transwestern Pipeline Company 22 FPC 542 (1959). Apart from that fact, however, virtually all producer contracts with pipelines contain take-or-pay and minimum take provisions. Assuming, *arguendo*, the authority of the Commission to abrogate and proscribe contracts between pipelines and their customers through informal rulemaking proceedings, the Commission acted arbitrarily in refusing to grant relief from take-or-pay and minimum take provisions in producer contracts. Such refusal has left Transwestern and other pipelines whose markets have been reduced or eliminated exposed to many millions of dollars of claims under their respective producer contracts.[13] Whether the Commission could lawfully deal only with take-or-

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[13] Transwestern estimates that if take-or-pay claims are asserted against it by all of its producers the amount for the year 1985 alone will approach $200 million. Transwestern has invoked force majeure as a result of Order No. 380 as a defense to claims which have been asserted. Such claims persist, however.

pay provisions in pipeline sales contracts and disregard corresponding provisions in producer contracts is a matter of critical importance to the pipeline industry which this Court should address.

6. This Case Presents the Issue of the Commission's Authority, Through Informal Rulemaking Proceedings, to Revoke or Substantially Modify Certificates of Public Convenience and Necessity to Serve Particular Markets.

Section 7 of the Act requires that any company proposing to offer jurisdictional service first apply for and receive a certificate from the Commission authorizing the proposed service. 15 U.S.C. § 717f(c)(1)(A) (1982). Once certification has been received and service has commenced, the company may not abandon service except upon the prior approval of the Commission. *Id.* § 717f(b). Except for certain limited circumstances not relevant here, *see id.* § 717f(a), however, the Commission may not compel a natural gas company to provide service that it is unwilling to render or to provide service it is willing to render on terms it finds unacceptable. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 387-88 (1959). The Commission has the authority to attach conditions to its issuance of a certificate authorizing service for which permission has been sought, *Florida Power & Light Co.* v. *FERC*, 598 F.2d 370 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980), but, in such a case, the applicant may reject the proffered certificate and decline to provide the service if it finds the conditions unacceptable, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. at 387-88.

This Court concluded that an administrative agency cannot revoke or substantially modify a certificate once it has been issued and accepted when it considered analogous provisions of the Interstate Commerce Act. *See United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 429-32 (1947). Similarly, in *CAB* v. *Delta Air Lines*, 367 U.S. 316, 322-25 (1961), the Court held

that the authority to revoke or amend a certificate would not be presumed where it was not explicit. A contrary conclusion would render meaningless the applicant's right to reject a conditioned certificate. The Commission could offer a certificate on acceptable terms and then, once the company had accepted the certificate and become subject to the abandonment requirements of the Act, impose changes in terms which would have caused the company to reject the certificate had the new terms been presented as conditions to initial certification. As articulated by an FERC Administrative Law Judge, the policy behind

> the sanctity or security of the certificate or authorization once granted and put in operation is the simple fact that massive investments must be and are made to construct facilities in reliance on the conditions and permanence for the prescribed term of the certificates issued by the Commission. Without such security, businessmen and investment institutions would not enter into such projects nor lend the necessary funds to make the projects possible. The record in this case leaves absolutely no doubt that investment funds will *not* be available if certificates, in the absence of violations, can be revoked by the granting agency at will for political or other reasons such as supply changes, pricing, *etc.*

Trunkline LNG Co., 22 FERC ¶ 63,028 at 65,138 (1983) (emphasis in original).

Though the structure of the Act, this Court's decisions in *Seatrain* and *Delta*, as well as substantial policy considerations, would suggest that the Commission is without authority to revoke or amend certificates issued under Section 7 of the Act — whether through informal rulemaking proceedings or otherwise — the question has never been squarely decided. As the Commission observed in 1983:

> The issue is extremely difficult. Neither this Commission nor its predecessor, the Federal Power Commission, has directly passed on the question.

Trunkline LNG Co., 22 FERC ¶ 61,245 at 61,442 (1983).

Order No. 380, taken with Section 7 of the Act, requires Transwestern to stand ready to provide 750,000 Mcf per day to PLGS. It enables PLGS, however, to take from Transwestern only when its needs are not met by other suppliers. Similarly, with respect to NWC, it is not only relieved of its obligation to take or pay for minimum volumes of gas from Transwestern, it is enabled to purchase from Transwestern only when such supplies are needed to meet peakday requirements. The service Transwestern was certificated to perform is thus converted from a "baseload" type of service to a "peaking" type of service. The type of service it is now required to provide as a result of Order No. 380 and Section 7 of the Act is plainly quite different from that which it indicated at the time of initial certification it was "able and willing . . . to perform." See Section 7(e), Natural Gas Act, 15 U.S.C. § 717f(e) (1972).

The court of appeals rejected the contention that service obligations had been unlawfully revoked by Order No. 380. It reasoned that Order No. 380 did not affect authorized service; rather, the court stated:

> Even assuming *arguendo* that the Commission has no authority to amend or revoke certificated service in a section 5 proceeding, the elimination of minimum bills [and minimum take provisions][14] has no effect on the pipeline's *authorized* service. The Order merely addresses the *rates* the pipeline may charge its customers and therefore was properly issued pursuant to section 5.

App. at 25-26, n. 9 (emphasis in original).

As noted, minimum take provisions deal with volumes, not rates. A certificated service which involves no assurance of any minimum daily delivery level is plainly different from one which involves an assured market of 600,000 Mcf per day.

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[14] The court below stated that, unless otherwise indicated, it uses the term "minimum bill" to include "minimum take" provisions. App. at 19, n. 3.

Whether this Court's decision in *El Paso* correctly states the law regarding certificated markets, whether the Commission can, through the exercise of its Section 5 authority, effectively revoke a certificate of public convenience and necessity issued under Section 7 of the Act to serve a particular market, and whether it did so in Order No. 380 are likewise significant issues affecting Transwestern and the entire industry and provide further warrant for this Court's review of the decision below.

CONCLUSION

This Court should issue its writ of certiorari to review the decision of the court below.

Respectfully submitted,

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Petition
Appendix

LETTERHEAD OF
TRANSWESTERN PIPELINE COMPANY

September 25, 1967

Pacific Lighting Service and Supply Company
720 West Eighth Street
Los Angeles, California 90017

Gentlemen:

This will evidence our agreement to sell to you and your agreement to buy from us an additional 110,000 Mcf of Contract Demand Volumes under our current Federal Power Commission Gas Tariff and Service Agreement modified only in accordance with the following provisions:

1. The CDQ and MDDQ shall be 750,000 Mcf per day. The provision regarding the MDTQ shall be unchanged except that the volume now stated shall be increased from 512,000 to 600,000 Mcf per day.

2. Deliveries hereunder shall commence on November 1, 1968, or at such later date as Seller's facilities required to render such service are completed.

3. Transwestern will file with the Federal Power Commission an initial rate for the 750,000 Mcf per day CDQ volumes to be effective upon commencement of deliveries hereunder and to be determined as follows:

(a) If Transwestern commences deliveries to Cities Service Gas Company ("Cities") pursuant to authorization issued in Docket No. CP67-339 prior to the date it commences service under this agreement, the initial rate for the 750,000 Mcf per day CDQ deliveries shall be a demand/commodity rate equal to 31.00¢ per Mcf at a 100% contract demand level adjusted, however, by adding the amount per Mcf by which Transwestern's average cost of gas exceeds 16.90¢ per Mcf or deducting the amount per Mcf by which such cost of gas is below 16.60¢ per Mcf. Transwestern's average cost of gas shall be determined on the basis of estimated purchases, after the removal of inerts, to meet Transwestern's system wide requirements for the first twelve months of operations at

the 750,000 Mcf per day CDQ level and rounded to the nearest 1/100th cent.

(b) If deliveries commence hereunder before Transwestern commences such service to Cities, the initial rate for the 750,000 Mcf per day CDQ deliveries shall be a demand/commodity rate equal to 31.25¢ per Mcf at a 100% contract demand level adjusted, however, by adding the amount by which Transwestern's average cost of gas exceeds 16.90¢ per Mcf or deducting the amount by which such cost of gas is below 16.60¢ per Mcf, such average cost of gas to be determined on the basis set forth in (a) above.

4. If deliveries commence hereunder before Transwestern commences deliveries to Cities pursuant to authorization issued in Docket No. CP67-339, then at such time as such deliveries to Cities do commence, Transwestern shall file a CDQ-1 rate to Pacific Lighting for the 750,000 Mcf per day deliveries at a demand/commodity rate equal to 31.00¢ per Mcf at a 100% contract demand level adjusted, however, by adding the amount by which Transwestern's average cost of gas exceeds 16.90¢ per Mcf or deducting the amount by which such cost of gas is below 16.60¢ per Mcf determined on the basis of estimated purchases, after the removal of inerts, to meet system wide requirements for the succeeding twelve months of operations, rounded to the nearest 1/100th cent.

5. If the initial rate for the 750,000 Mcf per day CDQ volumes exceeds 31.25¢, before the commencement of deliveries to Cities pursuant to authorization issued in Docket No. CP67-339, or 31.00¢, after that time, due to increased gas purchase costs as provided for in Paragraphs 3 and 4, and Transwestern receives refunds attributable to such increased costs, Transwestern shall flow through to Pacific Lighting that portion of the refunded costs which caused the initial rate to exceed 31.25¢ or 31.00¢, as the case may be. This obligation shall apply only to refunds for gas purchased by Transwestern prior to the earlier of the date that a rate increase filing by Transwestern covering rates to Pacific Lighting is placed in effect, or the effective

date of any change in rates resulting from any rate proceeding under the Natural Gas Act instituted by the Federal Power Commission against Transwestern, and this paragraph shall have no further force or effect thereafter.

6. Following commencement of deliveries to Pacific Lighting at the 750,000 Mcf per day level, if at any time and from time to time Transwestern's average cost of gas is below 16.60¢ per Mcf determined in the manner provided in Article IV of the May 1, 1967 Stipulation and Agreement filed in Docket No. RP67-8, but also taking into account estimated purchases, after the removal of inerts, to meet Transwestern's system wide requirements for the succeeding twelve months of operations, then Transwestern shall file a reduction in its then effective CDQ-1 rate to Pacific Lighting to reflect the amount by which Transwestern's average cost of gas as so determined is less than 16.60¢ per Mcf to the extent such lower average cost of gas has not theretofore been reflected in Transwestern's rate; provided, however, Transwestern's obligations to file rate reductions under this Paragraph 6 shall terminate and this paragraph shall have no further force and effect on the earlier of the date that a rate increase filing by Transwestern covering rates to Pacific Lighting is placed in effect or the effective date of any change in rates resulting from any rate proceeding under the Natural Gas Act instituted by the Federal Power Commission against Transwestern. If rate reductions are required pursuant to this paragraph, they shall be made effective as of the January 1, April 1, July 1 or October 1 date following the decrease in Transwestern's average cost of gas which required such rate reduction. No reduction shall be required, however, unless the unit reduction determined as provided above equals or exceeds one-tenth of one cent per Mcf. Such reduced rate shall be rounded off to the nearest 1/100th cent per Mcf. Any amount collected subsequent to the effective date of such reduced rate in excess thereof shall be refunded without interest.

7. Transwestern agrees to proceed promptly to make the necessary filings for Federal Power Commission approval for the delivery of the additional 110,000 Mcf

CDQ volumes provided hereunder. Transwestern and Pacific Lighting shall each have the right to cancel this agreement if the authorization granted by the Federal Power Commission is not in a form and substance satisfactory to each party. If all necessary Federal Power Commission authorization has not been received and accepted by April 1, 1968, then at any time thereafter prior to the acceptance of such certificate, either Transwestern or Pacific Lighting shall have the right to terminate this agreement by giving written notice of termination to the other.

8. Pacific Lighting shall have the option to require Transwestern to install facilities which will enable Transwestern to deliver an MDDQ in excess of 750,000 Mcf per day at a mutually agreeable initial rate whether or not the CDQ is increased above 750,000 Mcf per day.

9. This agreement or the filing of any rate reduction pursuant hereto shall not in any respect restrict, prejudice or affect Transwestern's right to file increased rates at any time or to make tariff changes or other filings permitted under its Federal Power Commission Gas Tariff now in effect pursuant to Article 3.2 of our present Service Agreement or Pacific Lighting's rights as provided therein to oppose such filings; it being further specifically understood that nothing herein shall be construed as constituting an agreement upon any principle, method or cost of service used in determining the rates provided for and neither this agreement nor any rate reduction filed pursuant hereto shall be used for any purpose in any Transwestern rate proceeding.

10. The parties shall execute and Transwestern shall file with the Federal Power Commission a new Service Agreement and such tariff revisions as shall be necessary to reflect the above modifications of its present Federal Power Commission Gas Tariff and Service Agreement. Such Service Agreement shall provide that the initial 20 year term shall commence on the effective date of such new Service Agreement.

If the foregoing correctly expresses our agreement, please so indicate by signing in the space provided below.

Yours very truly,

TRANSWESTERN PIPELINE
COMPANY

By: Original Signed By W. A. Koros
W. A. KOROS,
Vice President

ACCEPTED AND AGREED TO:

PACIFIC LIGHTING SERVICE AND
SUPPLY COMPANY

By: Original Signed By William L. Cole
Vice President

GAS SALES AGREEMENT

IT IS HEREBY AGREED by and between TRANSWESTERN PIPELINE COMPANY, a Delaware corporation ("Seller") and CITIES SERVICE GAS COMPANY, a Delaware corporation ("Buyer") that Seller shall sell and deliver to Buyer, and Buyer shall purchase from Seller and pay for, natural gas on the terms and conditions hereinafter set forth:

1. Definitions and References

An MCF is one thousand (1,000) cubic feet of gas at a base temperature of sixty degrees (60°) Fahrenheit and at a pressure base of 14.73 pounds per square inch absolute.

"Contract Year" or "Years" refers to a period beginning at 7:00 A.M. on the day of initial delivery of gas hereunder and ending at 7:00 A.M. on the first day of the next calendar year, and each calendar year thereafter.

"Contract Demand Quantity" or "CDQ" refers to the total volume of gas to be purchased and sold from time to time hereunder or each day under Part 2 below.

2. Quantity

Seller agrees to sell and deliver to Buyer, and Buyer agrees to take:

a. A CDQ of 50,000 Mcf for the contract years 1964 and 1965.

b. A CDQ of 100,000 Mcf beginning January 1, 1966.

c. At Buyer's request, Seller agrees to use its best efforts to deliver into Buyer's pipeline at the delivery points herein provided for, and through the facilities installed by Seller for delivering the CDQ volumes, such volumes in addition to the CDQ volumes which Seller is able to deliver. Further, at any time Seller's overall gas supply exceeds its market requirements, Seller will attempt to work out an arrangement to sell such gas to Buyer.

d. If during any one year period after January 1, 1966, Seller is unable to deliver an average daily quantity of 100,000 Mcf, the average daily quantity of gas so delivered by Seller during such year shall be the daily quantity Buyer shall be obligated to purchase each year thereafter, unless in a subsequent year a lesser quantity is so established, and thereupon each time a lesser quantity is so established then such lesser quantity shall be the quantity of gas Buyer shall be obligated to purchase each year thereafter during the term of this agreement.

3. Pressure and Point of Delivery

Seller shall deliver the gas to Buyer into Buyer's Guymon-Blackwell 26-inch pipeline at two delivery points. One delivery point will be at the intersection of Buyer's said 26-inch line with Seller's pipeline in the vicinity of the Doby Springs Field, Harper County, Oklahoma, and the other delivery point will be in the area of the Mocane and Laverne Fields in Beaver County, Oklahoma, also on Buyer's said 26-inch line, at a point to be mutually agreed upon by the parties. Seller shall install such facilities as may be required to make delivery of the volumes covered hereby, and Buyer shall install such facilities as may be required for it to receive such volumes. The delivery pressure at the two delivery points shall be such pressure as is required to deliver the gas into Buyer's 26-inch line, but in no event shall the delivery pressure at either delivery point be in excess of 725 psig.

4. Price

a. The price to be paid by Buyer to Seller for the gas shall be 20¢ per Mcf for the first six Contract Years. Such price is based on an assumed purchased gas cost of 16.7¢ per Mcf. Except for changes to reflect increases or decreases in purchased gas costs, neither Buyer nor Seller shall institute any proceeding with the Federal Power Commission which would change such rate for the first six Contract Years.

b. For all gas sold after the end of the sixth Contract Year, the price shall be in accordance with rate schedules and applicable tariffs filed by Seller with the Federal Power Commission. Seller shall have the right, from time to time, to file such rate schedules and tariffs to be effective after the expiration of said Sixth Contract Year and base the same on a rate of return satisfactory to Seller. Buyer shall have the right to protest any rate or tariff so filed with the Federal Power Commission.

c. *Billing.* Seller shall bill Buyer on or before the tenth day of each month for gas delivered during the preceding month in accordance with Seller's applicable rate schedule and Buyer shall pay Seller on or before the twentieth day of such month for sums due for the preceding month.

d. *Minimum Purchase Obligation.* After commencement of deliveries hereunder, the minimum volume to be taken by Buyer each month shall be 50% of the CDQ times the number of days in the month (minimum monthly contract volume) during the Contract Year 1964 and 70% of the CDQ times the number of days in the month (minimum monthly contract volume) during the Contract Year 1965. For each month during the Contract Years 1964 and 1965, in which Buyer fails to take the minimum monthly contract volume, Buyer shall, within 30 days after the end of each such year, pay Seller for the difference between the minimum monthly contract volume and the actual deliveries for such month without offsetting gas taken in excess of the minimum monthly contract quantity in any other month. For subsequent Contract Years, if Buyer fails to take at least 90% of the quantities it is obligated to take hereunder (100,000 Mcf times the number of days in the Contract Year), then Buyer shall within 30 days after the end of such Contract Year make payments to Seller for its deficiency below said 90% in takes during such Contract Year.

e. *Deficiency Gas.* If for any Contract Year commencing with 1966 Buyer should pay for gas not taken (referred to hereafter as deficiency gas), Buyer shall have the right for the next succeeding five years to take during any such Contract Year or Years such volumes as may be available over the CDQ times the number of days in the Contract Year so as to make up such gas previously paid for but not taken without further payment. Provided, that if the rate in effect at the time of taking any such deficiency gas is different from the rate in effect when such gas should have been taken and for which payment has been made, then an adjustment shall be made to reflect such difference.

5. Term

This Agreement shall be in effect for an initial term of twenty (20) years from and after the date of initial delivery of gas hereunder.

6. Warranty

Seller warrants that it owns or controls natural gas reserves free of claims of any other persons from which it can sell and deliver the quantities of natural gas herein provided for.

7. Regulatory Approval and Right of Termination

Buyer and Seller agree to proceed immediately to make the necessary filing for Federal Power Commission approval of the delivery and receipt of the gas contemplated herein. If the Federal Power Commission approves the deliveries contemplated hereby upon conditions (including price) which are materially different from the terms of this Agreement and are unacceptable to either Seller or Buyer, the party to whom such conditions are unacceptable shall for a period of thirty (30) days after the final issuance of such certificate have the right to terminate this Agreement.

8. Quality.

All gas delivered by Seller to Buyer shall conform to the following specifications:

a. *Heat Content.* The gas to be delivered hereunder shall have a minimum total heating value of 1,000 BTU's per cubic foot.

b. *Oxygen.* The gas shall not at any time have an oxygen content in excess of 0.2 of 1% by volume, and Seller will make every reasonable effort to keep the gas free of oxygen.

c. *Liquids.* The gas shall be free of water and hydrocarbons in liquid form at the temperature and pressures at which the gas is delivered. The gas shall in no event contain water vapor in excess of 7 pounds per million standard cubic feet at the point of delivery.

d. *Hydrogen Sulphide.* The gas shall not contain more than 0.25 of 1 grain of hydrogen sulphide per hundred standard cubic feet.

e. *Organic Sulphur.* The gas shall not contain more than 0.5 grains per hundred cubic feet of noncorrosive organic sulphur other than sulphur in mercaptan form, nor more than 0.2 grains per hundred cubic feet of sulphur in mercaptan form.

f. *Carbon Dioxide and Nitrogen.* The total of the carbon dioxide and nitrogen components shall not be in excess of 6% by volume; provided, however, that the total CO_2 content shall not exceed 3% by volume.

g. *Dust, Gums, Etc.* The gas shall be commercially free of dust, gums, and other solid matter.

9. Seller to Conform to Specifications

a. If the gas offered for delivery by Seller shall fail at any time to conform to any of the quality specifications set forth

above, Buyer will notify Seller of such deficiency and if Seller fails to remedy such deficiency promptly, Buyer may, at its option, refuse to accept further delivery pending correction by Seller, or, Buyer may accept delivery of such gas and make changes necessary to bring such gas into conformity with the specifications, for which Seller shall reimburse Buyer for any reasonable expense incurred by Buyer in effecting such changes.

b. Within the limits of the minimum heating value specifications herein specified, Seller shall have the right before delivery of the gas to Buyer to remove from the gas delivered hereunder any constituent thereof other than methane and shall have the right to remove such methane as is necessarily removed from gas in the process of removing other constituents.

10. Tariff

Seller shall file with the Federal Power Commission a gas tariff in compliance with applicable laws and regulations pertaining thereto which shall include a Rate Schedule, General Terms and Conditions, and Form of Service Agreement, all substantially in the form attached hereto as Exhibit A. Subject to any changes required by the Federal Power Commission in the form of such Tariff, it is hereby incorporated herein by reference and made a part hereof for all purposes. Seller and Buyer shall each have the right to take such action with regard to such filing as is deemed advisable in the sole discretion of the respective parties. Upon the final approval by the Federal Power Commission of the form of such Tariff, and if neither party exercises its right of cancellation under Part 7 above, Seller and Buyer shall enter into a Service Agreement in the form so approved by the Federal Power Commission with the Rate Schedule and General Terms and Conditions being made a part thereof, provided, however, that such Service Agreement shall neither supersede, cancel, nullify nor amend any term or provision hereof except to the extent that same specifically conflicts with a term or provision hereof.

11. Prior Agreements

This Agreement shall supersede and take the place of all prior agreements between Buyer and Seller and/or Trans-Cities Pipeline Company covering the sale and delivery of natural gas, and all such agreements are hereby rescinded. Trans-Cities Pipeline Company joins herein for the purpose of evidencing that all prior gas purchase and sales agreements between it and Buyer or Seller have been cancelled.

12. Force Majeure

a. Neither party shall be liable in damages to the other on account of "Force Majeure" occasioned by any act, omission or circumstances occasioned by or in consequence of any act of God, strikes, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, temporary failure of gas supply, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and any other cause, whether of the kind herein enumerated or not, and not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. However, failure to settle or prevent any strikes or other controversy with employees or with anyone purporting or seeking to represent employees shall not be considered to be a matter within the control of the party claiming suspension.

b. Subject to the last sentence of Part 12.a. hereof, neither Buyer nor Seller shall be relieved from liability in the event of its concurring negligence or failure on its part to use due diligence to remedy the force majeure and remove the cause with all reasonable dispatch nor shall such causes or contingencies affecting performance of this agreement relieve either party

from their obligations to make payments then due in respect of gas theretofore delivered.

13. Laws and Regulations

This Agreement is subject to all valid laws, orders, rules, and regulations of duly constituted authority having jurisdiction.

EXECUTED this 1st day of October, 1963.

TRANSWESTERN
PIPELINE COMPANY
Seller

ATTEST:

/s/ W. A. KOROS
Assistant Secretary
(SEAL)

By /s/ BASIL P. KANTZER
President

CITIES SERVICE GAS
COMPANY
Buyer

ATTEST:

/s/ KENNETH E. MANNER
Secretary
(SEAL)

By /s/ RUSSELL W. HOPSESS
Vice President

TRANS-CITIES PIPELINE
COMPANY

ATTEST:

/s/ KENNETH E. MANNER
Secretary
(SEAL)

By /s/ K. E. CRENSHAW
President

GAS SALES AGREEMENT

IT IS HEREBY AGREED by and between TRANSWESTERN PIPELINE COMPANY, a Delaware corporation ("Seller") and CITIES SERVICE GAS COMPANY, a Delaware corporation ("Buyer") that Seller shall sell and deliver to Buyer, and Buyer shall purchase from Seller and pay for, natural gas on the terms and conditions hereinafter set forth:

1. Definitions and References

An MCF is one thousand (1,000) cubic feet of gas at a base temperature of sixty degrees (60°) Fahrenheit and at a pressure base of 14.73 pounds per square inch absolute.

"Contract Year" or "Years" refers to a period beginning at 7:00 A.M. on the day of initial delivery of gas hereunder and ending at 7:00 A.M. on the first day of the first calendar month that begins after the expiration of twelve (12) full calendar months after initial delivery hereunder and each successive twelve (12) calendar months thereafter.

"Contract Demand Quantity" or "CDQ" refers to the total volume of gas to be purchased and sold from time to time hereunder on each day under Part 2 below.

2. Quantity

a. Seller agrees to sell and deliver to Buyer, and Buyer agrees to take:

(1) a CDQ of 100,000 MCF beginning November 1, 1968, increasing to

(2) a CDQ of 150,000 MCF beginning November 1, 1969, increasing to

(3) a CDQ of 200,000 MCF beginning November 1, 1970, increasing to

(4) a CDQ of 250,000 MCF beginning November 1, 1971.

b. At Buyer's request, Seller agrees to use its best efforts consistent with Seller's overall system operations to deliver to Buyer at the delivery point herein provided for, and through the facilities installed by Seller for delivering the CDQ volumes, such volumes in addition to the CDQ volumes which Seller is able to deliver.

c. If during any full Contract Year Seller is unable for any reason other than an event or events of Force Majeure to deliver an average daily quantity of gas equal to the CDQ specified in a. above, then the daily quantity Buyer shall be obligated to purchase each year thereafter shall be reduced by such average daily amount by which Seller was unable to deliver the CDQ, unless in a subsequent year a lesser quantity is so established, and thereupon each time a lesser quantity is so established then such lesser quantity shall be the quantity of gas Buyer shall be obligated to purchase each year thereafter during the term of this Agreement.

3. Delivery Point, Pressure and Facilities

a. Seller shall deliver gas hereunder to Buyer at or near the present northeasterly end of Seller's 24-inch pipeline in Hemphill County, Texas, at an interconnection to be made between Seller's existing 24-inch pipeline and a pipeline to be built by Buyer.

b. The delivery pressure shall be such pressure as is required to deliver the gas into Buyer's pipeline at the delivery point, but in no event shall Seller be required to deliver gas at a pressure in excess of 700 psig. Provided, however, if for any reason Seller operates its pipeline at pressures greater than 700 psig Buyer shall have the option to call for such higher delivery pressure at the delivery point so long as Seller operates at such higher pressure.

c. Seller shall install such facilities as may be required to make delivery of the volumes covered hereby, and Buyer shall

install such facilities as may be required for it to receive such volumes.

4. Price and Minimum Purchase Obligation

a. The initial rate to be paid by Buyer to Seller for gas delivered hereunder shall be a demand and commodity rate acceptable to both Buyer and Seller which equals 23¢ per MCF for 100% of the CDQ volumes. Neither Buyer nor Seller shall institute any proceeding with the Federal Power Commission which would change such rate for gas to be delivered on or before December 31, 1970.

b. Subject to the provisions of Paragraph 4.a. hereof Seller shall have the right, from time to time, to file changes in its Tariff and to increase or decrease the rate by the filing of new Rate Schedules or to change the form of the applicable Rate Schedule and to take such other and further action with respect thereto as may be legally permitted or required, and Buyer shall have the right to oppose any of the foregoing and to request reduction in rates to the extent that may be legally required or permitted.

c. Seller shall bill Buyer on or before the tenth (10th) day of each month for gas delivered during the preceding month in accordance with Seller's applicable Rate Schedule and Buyer shall pay Seller on or before the twentieth (20th) day of such month for sums due for the preceding month.

d. The minimum volume to be taken by Buyer each Contract Year shall be 90% of the CDQ times the number of days in the Contract Year. For each Contract Year, if Buyer fails to take at least 90% of the quantities it is obligated to take hereunder (the applicable CDQ times the number of days in the Contract Year), then Buyer shall within thirty (30) days after the end of such Contract Year make payment to Seller for its deficiency below said 90% in takes during such Contract Year.

e. If for any Contract Year Buyer should pay for gas not taken (referred to hereafter as deficiency gas), Buyer shall have the right for the next succeeding five (5) years to take during any such Contract Year or Years such volumes as may be available hereunder over the CDQ times the number of days in the Contract Year so as to make up such gas previously paid for but not taken without further payment. Provided, that if the rate in effect at the time of taking any such deficiency gas is different from the rate in effect when such gas should have been taken and for which payment has been made, then an adjustment shall be made to reflect such difference.

5. Term

This Agreement shall be in effect for an initial term of twenty (20) years from and after the date of initial delivery of gas hereunder.

6. Warranty

Seller warrants the title to all gas delivered to Buyer hereunder.

7. Regulatory Approval and Right of Termination

Buyer and Seller agree to proceed with diligence to make the necessary filings for Federal Power Commission approval of the delivery and receipt of the 150,000 MCF per day to be delivered under Part 2.a. (1) and (2) hereof. At a time to be mutually agreed upon, but in no event later than May 1, 1969, both parties shall make the necessary filings for Federal Power Commission approval of the delivery and receipt of the additional 100,000 MCF per day to be delivered under Parts 2.a. (3) and (4) hereof. If the Federal Power Commission approves the deliveries contemplated hereby upon conditions (including price) which are materially different from the terms of this Agreement and which are unacceptable to either Seller or Buyer, the party to whom such conditions are unacceptable shall for a period of

thirty (30) days after the final issuance of such certificate have the right to terminate this Agreement, except that such right of termination shall not extend any volumes to be delivered hereunder for which certificate authorization (whether temporary or permanent) has previously been accepted.

8. Quality

All gas delivered by Seller to Buyer shall conform to the following specifications:

a. *Heat Content.* The gas to be delivered hereunder shall have a minimum total heating value of 1,000 BTU per cubic foot saturated with water vapor.

b. *Oxygen.* The gas shall not at any time have an oxygen content in excess of 0.2 of 1% by volume, and Seller will make every reasonable effort to keep the gas free of oxygen.

c. *Liquids.* The gas shall be free of water and hydrocarbons in liquid form at the temperature and pressures at which the gas is delivered. The gas shall in no event contain water vapor in excess of seven (7) pounds per million standard cubic feet at the point of delivery.

d. *Hydrogen Sulphide.* The gas shall not contain more than 0.25 of 1 grain of hydrogen sulphide per hundred standard cubic feet.

e. *Organic Sulphur.* The gas shall not contain more than 0.5 grains per hundred cubic feet of noncorrosive organic sulphur other than sulphur in mercaptan form, nor more than 0.2 grains per hundred cubic feet of sulphur in mercaptan form.

f. *Carbon Dioxide and Nitrogen.* The total of the carbon dioxide and nitrogen components shall not be in excess of 6% by volume; provided, however, that the total CO_2 content shall not exceed 3% by volume.

g. *Dust, Gums, Etc.* The gas shall be commercially free of dust, gums, and other solid matter.

9. Seller to Conform to Specifications

a. If the gas offered for delivery by Seller shall fail at any time to conform to any of the quality specifications set forth above, Buyer will notify Seller of such deficiency and if Seller fails to remedy such deficiency promptly, Buyer may, at its option, refuse to accept further delivery pending correction by Seller, or, Buyer may accept delivery of such gas and make changes necessary to bring such gas into conformity with the specifications, for which Seller shall reimburse Buyer for any reasonable expense incurred by Buyer in effecting such changes.

b. Within the limits of the minimum heating value specifications herein specified, Seller shall have the right before delivery of the gas to Buyer to remove from the gas delivered hereunder any constituent thereof other than methane and shall have the right to remove such methane as is necessarily removed from gas in the process of removing other constituents.

10. Tariff

Seller shall file with the Federal Power Commission a new Rate Schedule and such changes in its FPC Gas Tariff as may be necessary to carry out the provisions of this Agreement. Seller and Buyer shall each have the right to take such action with regard to such Tariff as is deemed advisable in the sole discretion of the respective parties. Upon final approval by the Federal Power Commission of the changes in said Tariff and Seller's new Rate Schedule, and if this Agreement has not been terminated in its entirety under Part 7 above, Seller and Buyer shall enter into a Service Agreement in the form so approved by the Federal Power Commission with the Rate Schedule and General Terms and Conditions being made a part thereof, provided, however, that such Service Agreement shall neither supercede, cancel, nullify nor amend any term or provision hereof except to the extent that the same specifically conflicts with a term or provision hereof.

11. Force Majeure

a. Neither party shall be liable in damages to the other on account of "Force Majeure" occasioned by any act, omission or circumstances occasioned by or in consequence of any act of God, strikes, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, temporary failure of gas supply, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and any other cause, whether of the kind herein enumerated or not, and not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. However, failure to settle or prevent any strikes or other controversy with employees or with anyone purporting or seeking to represent employees shall not be considered to be a matter within the control of the party claiming suspension.

b. Subject to the last sentence of Part 11a hereof, neither Buyer nor Seller shall be relieved from liability in the event of its concurring negligence or failure on its part to use due diligence to remedy the force majeure and remove the cause with all reasonable dispatch nor shall such causes or contingencies affecting performance of this Agreement relieve either party from their obligations to make payments then due in respect of gas theretofore delivered.

12. Laws and Regulations

This Agreement is subject to all valid laws, orders, rules, and regulations of duly constituted authority having jurisdiction.

EXECUTED this 10th day of March, 1967.

TRANSWESTERN PIPELINE COMPANY
Seller

By /s/ W. A. KOROS
Vice President

CITIES SERVICE GAS COMPANY
Buyer

By /s/ RUSSEL W. HOFSESS
Vice President

GAS SALES AGREEMENT

IT IS HEREBY AGREED by and between TRANSWESTERN PIPELINE COMPANY, a Delaware corporation ("Seller") and CITIES SERVICE GAS COMPANY, a Delaware corporation ("Buyer") that Seller shall sell and deliver to Buyer, and Buyer shall purchase from Seller and pay for, natural gas on the terms and conditions hereinafter set forth:

1. Definitions and References

An MCF is one thousand (1,000) cubic feet of gas at a base temperature of sixty degrees (60°) Fahrenheit and at a pressure base of 14.73 pounds per square inch absolute.

"Contract Year" or "Years" refers to a period beginning at 7:00 A.M. on the day of initial delivery of gas hereunder and ending at 7:00 A.M. on the first day of the first calendar month that begins after the expiration of twelve (12) full calendar months after initial delivery hereunder and each successive twelve (12) calendar months thereafter.

"Contract Demand Quantity" or "CDQ" refers to the total volume of gas to be purchased and sold from time to time hereunder on each day under Part 2 below.

2. Quantity

a. Seller agrees to sell and deliver to Buyer, and Buyer agrees to take:

(1) a CDQ of 100,000 MCF beginning November 1, 1968, increasing to

(2) a CDQ of 150,000 MCF beginning November 1, 1969, increasing to

(3) a CDQ of 200,000 MCF beginning November 1, 1970, increasing to

(4) a CDQ of 250,000 MCF beginning November 1, 1971.

b. At Buyer's request, Seller agrees to use its best efforts consistent with Seller's overall system operations to deliver to Buyer at the delivery point herein provided for, and through the facilities installed by Seller for delivering the CDQ volumes, such volumes in addition to the CDQ volumes which Seller is able to deliver.

c. If during any full Contract Year Seller is unable for any reason other than an event or events of Force Majeure to deliver an average daily quantity of gas equal to the CDQ specified in a. above, then the daily quantity Buyer shall be obligated to purchase each year thereafter shall be reduced by such average daily amount by which Seller was unable to deliver the CDQ, unless in a subsequent year a lesser quantity is so established, and thereupon each time a lesser quantity is so established then such lesser quantity shall be the quantity of gas Buyer shall be obligated to purchase each year thereafter during the term of this Agreement.

3. Delivery Point, Pressure and Facilities

a. Seller shall deliver gas hereunder to Buyer at or near the present northeasterly end of Seller's 24-inch pipeline in Hemphill County, Texas, at an interconnection to be made between Seller's existing 24-inch pipeline and a pipeline to be built by Buyer.

b. The delivery pressure shall be such pressure as is required to deliver the gas into Buyer's pipeline at the delivery point, but in no event shall Seller be required to deliver gas at a pressure in excess of 700 psig. Provided, however, if for any reason Seller operates its pipeline at pressures greater than 700 psig Buyer shall have the option to call for such higher delivery pressure at the delivery point so long as Seller operates at such higher pressure.

c. Seller shall install such facilities as may be required to make delivery of the volumes covered hereby, and Buyer shall

install such facilities as may be required for it to receive such volumes.

4. Price and Minimum Purchase Obligation

a. The initial rate to be paid by Buyer to Seller for gas delivered hereunder shall be a demand and commodity rate acceptable to both Buyer and Seller which equals 23¢ per MCF for 100% of the CDQ volumes. Neither Buyer nor Seller shall institute any proceeding with the Federal Power Commission which would change such rate for gas to be delivered on or before December 31, 1970.

b. Subject to the provisions of Paragraph 4.a. hereof Seller shall have the right, from time to time, to file changes in its Tariff and to increase or decrease the rate by the filing of new Rate Schedules or to change the form of the applicable Rate Schedule and to take such other and further action with respect thereto as may be legally permitted or required, and Buyer shall have the right to oppose any of the foregoing and to request reduction in rates to the extent that may be legally required or permitted.

c. Seller shall bill Buyer on or before the tenth (10th) day of each month for gas delivered during the preceding month in accordance with Seller's applicable Rate Schedule and Buyer shall pay Seller on or before the twentieth (20th) day of such month for sums due for the preceding month.

d. The minimum volume to be taken by Buyer each Contract Year shall be 90% of the CDQ times the number of days in the Contract Year. For each Contract Year, if Buyer fails to take at least 90% of the quantities it is obligated to take hereunder (the applicable CDQ times the number of days in the Contract Year), then Buyer shall within thirty (30) days after the end of such Contract Year make payment to Seller for its deficiency below said 90% in takes during such Contract Year.

e. If for any Contract Year Buyer should pay for gas not taken (referred to hereafter as deficiency gas), Buyer shall have the right for the next succeeding five (5) years to take during any such Contract Year or Years such volumes as may be available hereunder over the CDQ times the number of days in the Contract Year so as to make up such gas previously paid for but not taken without further payment. Provided, that if the rate in effect at the time of taking any such deficiency gas is different from the rate in effect when such gas should have been taken and for which payment has been made, then an adjustment shall be made to reflect such difference.

5. Term

This Agreement shall be in effect for an initial term of twenty (20) years from and after the date of initial delivery of gas hereunder.

6. Warranty

Seller warrants the title to all gas delivered to Buyer hereunder.

7. Regulatory Approval and Right of Termination

Buyer and Seller agree to proceed with diligence to make the necessary filings for Federal Power Commission approval of the delivery and receipt of the 150,000 MCF per day to be delivered under Part 2.a. (1) and (2) hereof. At a time to be mutually agreed upon, but in no event later than May 1, 1969, both parties shall make the necessary filings for Federal Power Commission approval of the delivery and receipt of the additional 100,000 MCF per day to be delivered under Parts 2.a. (3) and (4) hereof. If the Federal Power Commission approves the deliveries contemplated hereby upon conditions (including price) which are materially different from the terms of this Agreement and which are unacceptable to either Seller or Buyer, the party to whom such conditions are unacceptable shall for a period of

thirty (30) days after the final issuance of such certificate have the right to terminate this Agreement, except that such right of termination shall not extend any volumes to be delivered hereunder for which certificate authorization (whether temporary or permanent) has previously been accepted.

8. Quality

All gas delivered by Seller to Buyer shall conform to the following specifications:

a. *Heat Content.* The gas to be delivered hereunder shall have a minimum total heating value of 1,000 BTU per cubic foot saturated with water vapor.

b. *Oxygen.* The gas shall not at any time have an oxygen content in excess of 0.2 of 1% by volume, and Seller will make every reasonable effort to keep the gas free of oxygen.

c. *Liquids.* The gas shall be free of water and hydrocarbons in liquid form at the temperature and pressures at which the gas is delivered. The gas shall in no event contain water vapor in excess of seven (7) pounds per million standard cubic feet at the point of delivery.

d. *Hydrogen Sulphide.* The gas shall not contain more than 0.25 of 1 grain of hydrogen sulphide per hundred standard cubic feet.

e. *Organic Sulphur.* The gas shall not contain more than 0.5 grains per hundred cubic feet of noncorrosive organic sulphur other than sulphur in mercaptan form, nor more than 0.2 grains per hundred cubic feet of sulphur in mercaptan form.

f. *Carbon Dioxide and Nitrogen.* The total of the carbon dioxide and nitrogen components shall not be in excess of 6% by volume; provided, however, that the total CO_2 content shall not exceed 3% by volume.

g. *Dust, Gums, Etc.* The gas shall be commercially free of dust, gums, and other solid matter.

9. Seller to Conform to Specifications

a. If the gas offered for delivery by Seller shall fail at any time to conform to any of the quality specifications set forth above, Buyer will notify Seller of such deficiency and if Seller fails to remedy such deficiency promptly, Buyer may, at its option, refuse to accept further delivery pending correction by Seller, or, Buyer may accept delivery of such gas and make changes necessary to bring such gas into conformity with the specifications, for which Seller shall reimburse Buyer for any reasonable expense incurred by Buyer in effecting such changes.

b. Within the limits of the minimum heating value specifications herein specified, Seller shall have the right before delivery of the gas to Buyer to remove from the gas delivered hereunder any constituent thereof other than methane and shall have the right to remove such methane as is necessarily removed from gas in the process of removing other constituents.

10. Tariff

Seller shall file with the Federal Power Commission a new Rate Schedule and such changes in its FPC Gas Tariff as may be necessary to carry out the provisions of this Agreement. Seller and Buyer shall each have the right to take such action with regard to such Tariff as is deemed advisable in the sole discretion of the respective parties. Upon final approval by the Federal Power Commission of the changes in said Tariff and Seller's new Rate Schedule, and if this Agreement has not been terminated in its entirety under Part 7 above, Seller and Buyer shall enter into a Service Agreement in the form so approved by the Federal Power Commission with the Rate Schedule and General Terms and Conditions being made a part thereof, provided, however, that such Service Agreement shall neither supercede, cancel, nullify nor amend any term or provision hereof except to the extent that the same specifically conflicts with a term or provision hereof.

11. Force Majeure

a. Neither party shall be liable in damages to the other on account of "Force Majeure" occasioned by any act, omission or circumstances occasioned by or in consequence of any act of God, strikes, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, temporary failure of gas supply, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and any other cause, whether of the kind herein enumerated or not, and not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. However, failure to settle or prevent any strikes or other controversy with employees or with anyone purporting or seeking to represent employees shall not be considered to be a matter within the control of the party claiming suspension.

b. Subject to the last sentence of Part 11a hereof, neither Buyer nor Seller shall be relieved from liability in the event of its concurring negligence or failure on its part to use due diligence to remedy the force majeure and remove the cause with all reasonable dispatch nor shall such causes or contingencies affecting performance of this Agreement relieve either party from their obligations to make payments then due in respect of gas theretofore delivered.

12. Laws and Regulations

This Agreement is subject to all valid laws, orders, rules, and regulations of duly constituted authority having jurisdiction.

EXECUTED this 10th day of March, 1967.

TRANSWESTERN PIPELINE COMPANY
Seller

By /s/ W. A. KOROS
Vice President

CITIES SERVICE GAS COMPANY
Buyer

By /s/ RUSSEL W. HOFSESS
Vice President

SERVICE AGREEMENT — FORM F

For Buyers Receiving Service Under Rate Schedule CDQ-3

This contract made between TRANSWESTERN PIPELINE COMPANY, hereinafter called "Seller", and CITIES SERVICE GAS COMPANY, hereinafter called "Buyer", whether one or more.

NOW, THEREFORE, in consideration of the mutual promises and agreements herein contained, the parties agree as follows:

Article 1 — Gas to be Purchased and Sold:

Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase from Seller, for the term of this agreement, natural gas on the terms and conditions hereinafter set forth.

The CDQ to be delivered during each contract year is 150,000 Mcf per day; provided, however, that the CDQ shall be 75,000 Mcf per day for the first contract year and 100,000 Mcf per day for the second contract year. The contract year shall be a fiscal year commencing with date of first delivery.

If during any full contract year Seller is unable for any reason other than an event or events of force majeure to deliver an average daily quantity of gas equal to the CDQ, then the daily quantity Buyer shall be obligated to purchase each year thereafter shall be reduced by such average daily amount by which Seller was unable to deliver the CDQ, unless in a subsequent year a lesser quantity is so established, and thereupon each time a lesser quantity is so established then such lesser quantity shall be the quantity of gas Buyer shall be obligated to purchase each year thereafter during the term of this agreement.

If the above provided volumes are increased by mutual agreement, Seller and Buyer shall execute a new Service Agreement including the increased volume.

Article 2 — Term:

This Agreement shall become effective upon the execution hereof and shall continue in full force and effect for an initial term of twenty (20) years from the date of first delivery of gas hereunder to Buyer.

The period of time to be covered by any superseding Service Agreement between Seller and Buyer providing for an increased CDQ shall be determined by agreement between such parties, subject to the right of either party to require that the term of such superseding Service Agreement shall be for twenty (20) years from the date of first delivery of gas thereunder.

Article 3 — Rate Schedules:

3.1 Buyer shall pay Seller for all services rendered hereunder and for the availability of such service under Seller's Rate Schedule CDQ-3 as filed with the Federal Power Commission and as the same may be hereinafter revised or changed.

This Agreement in all respects shall be and remain subject to the applicable provisions of the said Rate Schedule and of the General Terms and Conditions of Seller on file with the Federal Power Commission, all of which are by this reference made a part hereof.

3.2 Seller shall have the right from time to time to increase or decrease the rates by the filing of new rate schedules or to change the form of the applicable rate schedule or rate schedules and to take such other and further action with respect thereto as Seller is legally permitted or required to do, and Buyer shall have the right to oppose any of the foregoing and to request reduction in rates to the extent that Buyer is legally permitted or required to do.

Article 4 — Measurement Pressure:

The average absolute atmospheric pressure which shall be used to compute the quantities of gas delivered shall be 13.2 pounds per square inch.

Article 5 — Pressure:

Seller shall deliver gas into Buyer's 26-inch Transwestern to Blackwell pipeline at such pressure as is required, but not in excess of 700 psig.

Article 6 — Points of Delivery:

The point of delivery of natural gas hereunder shall be at a point of interconnection of Seller's and Buyer's facilities in Section 80, Block 42, H&TC RR Survey, Hemphill County, Texas.

Article 7 — Notices:

Notices to either party shall be sent by United States mail or Western Union telegram addressed as follows:

(a) Transwestern Pipeline Company
Post Office Box 2521
Houston, Texas 77001

(b) Cities Service Gas Company
Post Office Box 25128
Oklahoma City, Oklahoma 73125

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their duly authorized officers and attested to by their Secretaries or Assistant Secretaries on this ..... day of July, 1971:

TRANSWESTERN PIPELINE COMPANY

ATTEST:

By /s/ I. DAVID BUFKIN
Vice President

/s/ E. N. HOWARD
Assistant Secretary

CITIES SERVICE GAS COMPANY

ATTEST:

By /s/ RUSSELL W. HOFSESS
Vice President

/s/ F. W. HARRIGER, JR.
Assistant Secretary